FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS, AND D. F. BIGGS, PLAINTIFF,
Appellant

vs.

BUREAU OF REVENUE AND JOHN D. BINGAMAN, COMMISSIONER OF REVENUE, DEFENDANTS,
Appellees.

BRIEF ON BEHALF OF APPELLEE

FRANK H. PATTON,
Attorney General
Santa Fe, New Mexico.

RICHARD E. MANSON,
Assist. Atty. Gen.
Santa Fe, New Mexico

Attorneys for Appellees.

INDEX

SUBJECT INDEX

Page

APPELLEE'S STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF APPELLANTS' ARGUMENT 3

APPELLEES' ANSWER TO APPELLANTS' POINTS:

POINTS II, III, IV, V.

A. THE CONTRACTS ARE NOT TRANSACTIONS IN INTERSTATE COMMERCE 4-14

B. TAXATION OF REVENUE RECEIVED UNDER THE CONTRACTS IMPOSES NO DIRECT OR SUBSTANTIAL BURDEN UPON INTERSTATE COMMERCE AND IS NOT PROHIBITED BY THE FEDERAL CONSTITUTION 15-21

C. APPELLANTS' CASES DISTINGUISHED 21-27

CONCLUSION 27-28

APPENDICES 29-34

APPENDIX A.—Chap. 7, Special Session Laws of 1934 29-31

APPENDIX B.—Chap. 9, Session Laws of 1935 of N. M. 32-33

APPENDIX C.—Article I, Sec. 8, U. S. Constitution 34

TABLE OF CASES

Page

Alpha Portland Cement Company vs. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916 16

Anderson v. U. S., 171 U. S. 604, 19 S. Ct. 50, 43 Law Ed. 300 9

Anglo Chilean Nitrate Sales Corporation vs. Alabama, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710 17-20

Atlantic & Pacific Telegraph Co. vs. Philadelphia, 190 U. S. 160, 47 L. Ed. 995 17

Berry, Howard W., trading as The Howard W. Berry Advertising Agency v. Melvin C. Hazen, et al. (21 Fed. Sup—?) 14

Blumenstock Bros. Advertising Agency v. Curtis Pub. Co., 64 L. Ed. 649, 252 U. S. 436, 40 S. Ct. 385 10-21-22

Commonwealth of Virginia vs. Imperial Coal Sales Company, 293 U. S. 15, 55 S. Ct. 12, 79 L. Ed. 171 19-20

Educational Film Corp. vs. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400 19

Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U. S. 650, 56 Sup. Ct. Rep. 608, 80 L. Ed. 956 21-24-25

Fox Film Corp. vs. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 19

Gibbons v. Ogden, 9 Wheat. 187, 6 Law Ed. 23 13-14

Hooper v. California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 ..... 7- 8

Hump Hairpin Manufacturing Co. vs. Emerson, 258 U. S. 290, 66 L. Ed. 622 p. 294, 42 S. Ct. 305 27

Indiana Farmers' Guide Publishing Company vs. Prairie Farmers Publishing Company, 293 U. S. 268, 55 Sup. Ct. 182, 79 L. Ed. 356 21-22-23

Page

In Re Messenger's Merchant Lunch Room (C.C.A. 7), 85 Fed. (2d) 1002 21

International Textbook Co. vs. Pigg, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 15-21-26

KVL v. Tax Commission, 12 F. Supp. 497 25

Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A. L. R. 100 10-11-21-22

Matson Navigation Co. vs. State Board of Equalization, 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791, rehearing denied 297 U. S. 928, 556 S. Ct. 666, 80 L. Ed. 1011 18

Ozark Pipe Line Company vs. Monier, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 17

Paul v. Virginia, 19 L. Ed. 357, 8 Wall. (75 U. S.) 168 6-7-22

Post Printing and Publishing Company vs. Brewster, 246 Fed. 321 21

Postal Telegraph Cable Co. v. Adams, 71 Miss. 555, 14 So. 36, 42 A.S.R. 476 20

Postal Telegraph Co. vs. Adams, 155 U. S. 688, p. 695, 15 S. Ct. 268, 39 L. Ed. 311 p. 315 18

Postal Telegraph Co. vs. Richmond, 249 U. S. 252, 39 S. Ct. 265, 63 L. Ed. 590 17

Ratterman vs. Western Union, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229 18

State of Utah v. Salt Lake Tribune Publishing Company, 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553 10-12-22

Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054 19

Transcontinental and Western Air, Inc. vs. Lujan, 36 N. M. 64, 8 Pac. (2nd) 103 18

Page

United States v. Fur Dressers' & Fur Buyers' Assoc., 5 Fed. (2nd) 869 10

United States Glue Co. vs. Town of Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 19

Virginia vs. Imperial Coal Sales Co., 293 U. S. 15, 79 L. Ed. 171, 55 S. Ct. 12 19

Ware & Leland v. Mobile County, 209 U. S. 405, 28 S. Ct. 526, 52 Law Ed. 855 ..... 8- 9

Western Union Telegraph Co. vs. Seay, 132 U. S. 472, 10 S. Ct. 161, 33 L. Ed. 409 18

Williams vs. Fears, 45 L. Ed. 186, 179 U. S. 270, 21 S. Ct. 128 ..... 7- 8

TABLE OF STATUTES

Chap. 9, N. M. Laws of 1935 2

Chap. 7, Special Session Laws of 1934 2-21

Sec. 201, 202, 206, Chap. 7, Special Session Laws of 1934 5-6-15

Art. I, Sec. 8, Federal Constitution 5

Sec. 7, Sherman Anti-Trust Act, 26 Stat. Atl. L. 209 ..13-22

TEXT CITATIONS

5 R.C.L. 784-801 21
6 L.R.A. 579 21
11 L.R.A. 246-179 21
12 L.R.A. 624 21
9 L.R.A. 366 21
29 Law Ed. 158 21
6 Law Ed. 23-678 21
32 Law Ed. 229 21
37 Law Ed. 217 21
38 Law Ed. 1041 21
39 Law Ed. 311-538 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS, AND D. F. BIGGS, PLAINTIFF,
Appellant

vs.

BUREAU OF REVENUE AND JOHN D. BINGAMAN, COMMISSIONER OF REVENUE, DEFENDANTS,
Appellees.

BRIEF ON BEHALF OF APPELLEE

APPELLEE'S STATEMENT OF THE CASE

On November 14th, 1935, the plaintiff, appellant here, filed an amended complaint in the District Court of Santa Fe County, New Mexico, against the Bureau of Revenue wherein it was sought to recover certain Emergency School Taxes theretofore paid under protest (R-1). Defendant, Appellee here, demurred (R-6) to the amended complaint and argument was had thereon on the 15th day of February, 1936, whereupon the court overruled the demurrer and upon refusal of defendant to plead further entered final

judgment on February 20th, 1936 (R-9). From said final judgment defendant appealed to the Supreme Court of this State and upon hearing the judgment was reversed. (R-19.) Upon entry of the Mandate of Reversal in the lower court appellants refused to plead further, (R-21) stood upon their amended complaint, and final judgment was entered dismissing appellant's cause with prejudice (R-22). Appellant again appealed and the Supreme Court of New Mexico rendered its second opinion affirming the lower court in dismissing appellant's action with prejudice (R-23). Thereupon, appellant, Western Livestock, sought an appeal to the Supreme Court of the United States (R-24) and the matter is now before this court for hearing thereon (R-26).

STATEMENT OF FACTS

Appellee accepts appellants' statement of facts, which is detailed in its brief under the heading "Statement of the Case", but for the convenience of this court we desire to supplement as follows:

The amended Complaint, (R-1), together with the amendments by interlineation to same, will henceforth be designated herein as the Complaint, and these Pleadings correctly state the facts which briefly may be summarized as follows:

The plaintiff is a partnership with its principal office and its place of business in Albuquerque, New Mexico; the defendant, Bureau of Revenue, was created by Chapter 9, Laws of 1935, of New Mexico (App. B), and is vested with the power and charged with all duties conferred and imposed upon the State Tax Commission by the Emergency School Tax Act, which is Chapter 7 of the Special Session Laws of 1934 (App. A).

The plaintiff is the owner and publisher of a magazine, which is prepared, edited and published in Albuquerque, New Mexico; this magazine has a general circulation and distribution throughout the State of New Mexico and other states, and is distributed by mail.

The magazine receives and publishes, under contracts, advertisements of products which are manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These foreign advertisements are obtained by plaintiff both through personal solicitation on the part of plaintiff, and through what is known as advertising agencies, located in states other than New Mexico. Some of these advertising contracts are made between plaintiff and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiff and an advertising agency, such advertising agency having a different and separate contract with the manufacturer and in such cases all dealings, in connection therewith, are between the plaintiff and the agency.

In the preparation of the advertisements for insertion in the plaintiff's magazine, certain advertising cuts, mats, material, information, intelligence and copy, are sent to plaintiff by said foreign advertisers, and plaintiff receives compensation pursuant to the contract to carry the advertising from such foreign advertisers, and it is upon the receipts derived by plaintiff from such advertising contracts that the tax herein under consideration is imposed.

All facts are more completely detailed, as stated, in the Complaint.

SUMMARY OF APPELLANTS' ARGUMENT

The demurrer filed in this cause (R-6) raises two main legal questions, which appear in order therein, and which are as follows: paragraphs 1, 2 and 3 of the demurrer raise the question that the advertising contracts constitute neither transactions in interstate commerce, nor instrumentalities thereof; paragraph 4 of the demurrer raises the question that even though the transactions constitute interstate commerce, nevertheless such transactions are not shown to be of the class exempted from taxation under the Constitution of the United States and of this state, these being direct and substantial burdens upon interstate commerce.

To summarize, it will be seen that we contend first; that the *contracts* for this so-called national advertising do not constitute transactions in interstate commerce, and that the tax upon the revenues derived therefrom is validly imposed as being within the taxing power of the state. Second, that even if these contracts were interpreted to be transactions in interstate commerce, or, if they are instrumentalities thereof, still they are not within the protection of the commerce clause of the Federal Constitution.

The taxation in this case can at most only *incidentally, indirectly, remotely,* and *unintentionally* affect interstate commerce and imposes no direct or substantial burden thereon.

The contract, as we view it, may be the means of leading to and causing a transaction in interstate commerce in that a reader of the advertisement may desire to purchase a quantity of cigarettes, the shipment of which would constitute interstate commerce, but the means only remotely affects interstate commerce. The result might well be termed speculative. The contract itself only incidentally affects interstate commerce and the contract itself, in view of all the foregoing, is, in our opinion, not a transaction in interstate commerce.

Therefore, *revenues* derived from such contracts may be taxed by the state and the same would be true even though such contracts may be deemed to be instrumentalities of interstate commerce, as the imposition of the tax neither imposes a direct or substantial burden upon same nor unduly interferes with it but only incidentally and remotely affects such interstate commerce.

APPELLEES' ANSWER TO APPELLANTS' POINTS II, III, IV, V.

A.

THE CONTRACTS ARE NOT TRANSACTIONS IN INTERSTATE COMMERCE

That newspapers published in one state and transported across the boundary line into and through other states is

a part of interstate commerce cannot be denied, but we are not concerned with this question.

The tax assailed is imposed by Section 201 of Chapter 7, Special Session Laws of 1934, (App. A) which reads as follows:

> "There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:"

As applicable to plaintiffs the measure of the tax is prescribed by sub-paragraph I of Section 201, (App. A) reading:

> "At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: * * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * * *"

Article I, Section 8 of the Federal Constitution is commonly known as the "Commerce Clause" of the Constitution and it provides, in brief, that the Federal Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes. As a general rule, it may be stated broadly that the states have no power to regulate, burden or interfere with interstate commerce and that its regulation is left exclusively to the Federal Congress.

The legislature of the State of New Mexico recognized this principle when it considered and enacted the sales tax

law as is shown by Section 202 of said Chapter 7, (App. A) said section being as follows:

> "None of the taxes levied by this act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with Indian tribes . . ."

Section 206 of said Chapter (App. A) also reveals that the legislature recongized this principle and shows that the legislature intended to prevent and avoid contravention of the commerce clause of the Federal Constitution, and this section provides for the determination by the Tax Commission of the value of products "when transported out of the state and before they enter interstate commerce."

One of the historic opinions of the Supreme Court of the United States was that decided in 1869 and entitled *Paul v. Virginia,* cited in 19 L. Ed. 357, 8 Wall. (75 U. S.) 168.

The opinion in *Paul v. Virginia* was delivered by Mr. Justice Field, and was one of the first cases which took into consideration the question of contracts made by citizens of different states. The contract in this case was a contract of insurance, and without discussing the facts involved, we desire to call attention to that part of the opinion wherein the court said:

> "There is, therefore, nothing in the fact—that the insurance companies of New York are corporations—to impair the force of argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word . . . they are not commodities to be shipped or forwarded from one state to another and then put up for sale. They

> are like other personal contracts between the parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different states. . . they do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Apparently, under this decision, the court considered a contract of insurance as being one which rested upon the same basis and subject to the same legal principles as other contracts between citizens of different states.

In *Williams v. Fears*, 45 L. Ed. 186, 179 U. S. 270, 21 S. Ct. 128, we find an interesting opinion by Mr. Chief Justice Fuller. That case involved the right of the State of Georgia to impose a license tax upon agents who are engaged in the occupation of hiring laborers in the State of Georgia to be employed beyond the limits of the state, and it was contended that these contracts and the making of same constituted an occupation connected with and relating to interstate commerce and that therefore the tax was unconstitutional.

However, the court in considering this argument used this language:

> "These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the immigrant agent was engaged in transportation, or that the tax on his occupation was levied on transportation."

In *Hooper v. California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297, Mr. Justice White adverted to the distinction and difference between interstate commerce, or an instru-

mentality thereof, on the one side, and the mere incidents which may attend the carrying on of such commerce on the other side, and in said opinion he further states:

> "'If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states and would exclude state control over many contracts purely domestic in their nature.'"

In the *Williams v. Fears* case, supra, the Court held that the imposition of the tax upon the agent fell within the distinction which we have just stated and it was further held, specifically and definitely, that the labor contracts were not in themselves subjects of traffic between the states and that the business of hiring laborers was not so immediately connected with interstate transportation so that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax imposed was a burden upon interstate commerce.

The case of *Ware & Leland v. Mobile County*, 209 U. S. 405, 28 S. Ct. 526, 52 Law Ed. 855, was a case in connection with state taxation of buying and selling futures, the business being one of taking orders on commission for the purchase and sale of grain and cotton for future delivery and transmitting such orders to other states. The Court held that such transactions would not constitute interstate commerce. After reviewing a number of cases, Mr. Justice Day, who wrote the opinion, said (Page 858):

> "There is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state where the contract itself is to be completed and carried out wholly

within the borders of such state, although such contracts incidentally affect interstate trade."

The Court further said:

> "These contracts are not the subject of interstate commerce any more than in the insurance cases.... The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of the purchase by means of interstate carriage would not make the contracts as made and executed the subjects of interstate commerce."

In *Anderson v. U. S.*, 171 U. S. 604, 19 S. Ct. 50, 43 Law Ed. 300, the Supreme Court said:

> "Where the subject- matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transactions of the business in which the parties to the agreement were engaged, such agreement will be withheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to obtain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental and not its purpose or object."

The Court, in the same case in a different part of the opinion used this language:

> "The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their busi-

> ness among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly though only indirectly and unintentionally affect interstate commerce, in that event we think the agreement would be good."

The Anderson case was considered in the case of *United States v. Fur Dressers' & Fur Buyers' Association,* 5 Fed (2nd) 869, which case is not necessarily in point as to the matter under consideration, but we merely desire to show that we have taken the foregoing quotations from said latter case.

We are familiar with the holdings in *Little v. Smith,* 124 Kan. 237, 257 P. 959, 57 A. L. R. 100; a Kansas case, and *State of Utah v. Salt Lake Tribune Publishing Company,* 68 Utah 187, 249 Pac. 474, 48 A. L. R. 553 a Utah case, which involved statutes of the states of Kansas and Utah, respectively, prohibiting the publishing of advertisements within said states of cigarettes, but we do not believe that same are controlling in the case at hand and we prefer to rely upon the holding of the Supreme Court of the United States in *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.,* 64 Law Ed. 649, 252 U. S. 436, 40 S. Ct. 385.

In the Kansas case, supra, the plaintiffs, partners publishing a newspaper in the State of Kansas, brought an action on behalf of themselves and also in behalf of the Kansas Press Association engaged in publishing approximately 175 newspapers in Kansas. The action was brought under a declaratory judgment statute for the interpretation of an Act, which prohibited the advertising of cigarettes in any newspaper or periodical published in Kansas. The plaintiffs alleged that they had a large interstate circulation of their newspapers, that they had received offers to publish in their papers advertisements of cigarettes made by manufacturers outside of Kansas, engaged in shipping their products into Kansas in the original package, but they had been

prevented from accepting such offers by reason of the statute. It was the plaintiff's contention that the statute transcended constitutional limitations by placing an unreasonable burden upon interstate commerce. The Court said at pages 961-2:

"It is insisted first by plaintiffs that under the statute, the sale of cigarettes is authorized and lawful with the exception as to minors, and must be treated as an article of commerce, and that, being manufactured in other states and transported and sold in this state, it is protected by the interstate commerce clause of the Federal Constitution. Advertisements of goods in interstate commerce is an aid to the sale and must be regarded as an essential part of the business. It has been held that 'newspapers are subjects of commerce, within the meaning of * * * the Constitution of the United States, relating to commerce between the states'. Preston v. Finley (C.C.) 72 Fed. 850.

In another case the court declared that 'every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.' Butler Bros. Shoe Co. vs. United States Rubber Co., 84 C. C. A. 167, 156 Fed. 1.

See also Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. Ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; International Textbook Co. v. Pigg, 217 U. S. 91; 54 L. Ed. 678; 27 L. R. A. (N. S.) 493; 30 Sup. Ct. Rep. 481; 18 Ann. Cas. 1103, Newspapers and other media of conveying information regarding proper subject of interstate commerce must be deemed to be engaged in such commerce. *Cigarettes transported from other states, sold in original packages, is commerce, and contracts for advertising and the newspapers themselves carrying such information and advertisements in order to promote sales are with-*

in the protection of the commerce clause of the Constitution." (Italics ours.)

A judgment in favor of the defendants was therefore reversed, the Court finding that the Act prohibiting the advertisement of cigarettes was unconstitutional.

Here was an interpretation of a Kansas statute, which prohibited newspapers and periodicals from carrying these advertisements of a product the sale and transportation of which was not prohibited. To prohibit these advertisements entirely, possibly was contrary to the commerce clause of the Federal Constitution as constituting an unreasonable burden upon interstate commerce, and the Court merely held that the advertising contracts were *within the protection of the commerce clause.* (Italics ours.)

It is readily apparent that this is entirely different and distinguishable from an attempt to levy a tax which is not directly burdensome upon an instrumentality of interstate commerce, assuming for the purpose of argument that these contracts are such instrumentalities but which we do not admit.

In the Utah case, supra, the defendant publishing company appealed from its conviction under a Utah statute making it a misdemeanor for any newspaper or periodical, printed or published in Utah, to display any advertisements of cigarettes or other forms of tobacco. The defendant published an advertisement of Lucky Strike cigarettes, pursuant to a contract for such advertising with a non-resident tobacco company. Its conviction for violation of the statute followed.

In reversing and annulling the judgment of the lower court and discharging the defendant, the Supreme Court of Utah said at page 477:

"It is expressly stipulated that the American Tobacco Company is a corporation of the state of New Jersey and that the advertisement in question was pub-

lished pursuant to a contract entered into between that company and the defendant. Under the ruling of the United States Supreme Court all sales by that company which were made in original packages are protected by the Interstate Commerce Act (U. S. Comp. Stat. Sec. 8563 et seq. 4 Fed. Stat. Anno. 2d ed. 537. *Moreover, as we have seen, the publication of the advertisement itself constitutes interstate commerce and hence is also protected by that act.*" (Italics ours.)

This statute likewise absolutely prohibited these advertisements. The sales themselves constituted interstate commerce. Without the advertisements, conceivably there may have been no sales and to prohibit the advertisements no doubt interfered with the sales.

Therefore, such prohibitions constituted direct and substantial burdens upon interstate commerce and for this reason the advertisements were within the protection of the commerce clause. In the case at Bar, the tax is merely upon the *revenue* derived from the completed act of advertising.

Suit was brought by Blumenstock Bros., supra, who conducted an advertising agency, against the Curtis Publishing Company in the Federal District Court to recover treble damages under Section 7 of the Sherman Anti-Trust Act, 26 Stat. At. L. 209, and the procedure in regard to advertising contracts was similar to the procedure under discussion here.

In the course of such business, the defendant dealt with plaintiff and also with other advertising agencies and it was contended that such dealings were transactions in interstate commerce and that the business of editing, publishing and distributing throughout the United States the advertising matter contained in the publications, pursuant to contracts made for such advertising, was interstate commerce.

The Court quoted from the opinion of Mr. Chief Justice Marshall in the celebrated case of *Gibbons v. Ogden*, 9

Wheat, 187, 6 Law Ed. 23, wherein it is said that commerce is not traffic alone, it is intercourse,—"it describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The Court then continued and said:

> "The subject matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon, or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive, except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

In the present case we find a contract for advertising to be inserted in a New Mexico newspaper, which, in part is engaged in interstate commerce, insofar as circulation and distribution of the paper is concerned.

We are not concerned with the circulation and distribution of the paper, however. We are only concerned with the proceeds accruing to the paper by virtue of the contract for the insertion of such advertising.

In line with the foregoing and following the Blumenstock Case, we desire to call attention to the case of Howard W. Berry, trading as the Howard W. Berry Advertising Agency vs. Melvin C. Hazen, et al., which was decided in the United States District Court for the District of Columbia on November 22nd, 1937, and which has not yet been reported. The Court there held that the advertising contracts were not Interstate Commerce.

B.

TAXATION OF REVENUE RECEIVED UNDER THE CONTRACTS IMPOSES NO DIRECT OR SUBSTANTIAL BURDEN UPON INTERSTATE COMMERCE AND IS NOT PROHIBITED BY THE FEDERAL CONSTITUTION.

By referring to Section 202 of said Chapter 7 of the Special Session Laws of 1934, (App. A) we find that the taxes shall not apply to *"transactions in interstate commerce, which, under the constitution of the United States, the State of New Mexico is prohibited from taxing."* (Italics ours.)

There have been literally hundreds of cases involving the power of the states to levy taxes of one form or another upon transactions in interstate commerce or upon an instrumentality thereof, and the general test seems to be whether or not the imposition of the tax, compliance with certain conditions, requirements of licenses and so on, impose direct or substantial burdens upon interstate commerce.

An illustration of this statement may be found in *International Textbook Co. vs. Pigg,* 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678.

In that case a contract was involved which contemplated transactions between citizens of different states, bona fide transactions in interstate commerce. Without the contract in the first instance there could, of course, be no shipment of goods, no transaction in interstate commerce.

To directly burden the contract would of course constitute an undue interference with interstate commerce and would impose a direct and substantial burden thereon.

We would not for a moment contend that the state of New Mexico could impose a tax upon the cuts and mats mentioned in the Complaint as a privilege for them to enter the state. This certainly would be an undue interference with interstate commerce.

But assuming that these cuts and mats have an intrinsic value it will not on the other hand be argued by counsel that once they have come to rest in this state and acquired a situs, that a property tax could not be imposed upon them.

To show the power of the state to tax in matters affecting interstate commerce and the limitations upon such power, and as illustrative of direct and substantial burdens, we desire to refer to the following cases.

In the case of *Alpha Portland Cement Company vs. Massachusetts,* 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, it was held that the state could not impose an excise tax measured in part upon the net income of a foreign corporation engaged in interstate commerce. In this connection, the Court said:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the 14th Amendment does not permit taxation of property beyond the states' jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 87; 58 L. Ed. 127, 134; 34 Sup. Ct. Rep. 15, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."

> "The local business of a foreign corporation may support an excise measure in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113; 65 L. Ed. 165; 41 Su. Ct. Rep. 45, approved such an excise measure by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind.

Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce, or property beyond the state . . . ''

''The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state . . . '' 69 L. Ed. 924.

It is also held in *Ozark Pipe Line Company vs. Monier,* 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439; and *Anglo Chilean Nitrate Sales Corporation vs. Alabama,* 288 U. S. 18, 53 S. Ct. 373, 77 L. Ed. 70, that certain statutes imposing franchise taxes were invalid when applied to foreign corporations engaged exclusively in interstate commerce.

''No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce.'' Atlantic and Pacific Telegraph Co. vs. Philadelphia, 190 U. S. 160, 47 L. Ed. 995.

In discussing a license tax, the Court, in *Postal Telegraph Co. vs. Richmond,* 249 U. S. 252, 39 S. Ct. 265, 63 L. Ed. 590, said:

''The principle of these cases, and of many others cited in the opinions, is that, as against Federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce . . . '' 63 L. Ed. 594.''

In other words, the state is not possessed of power to impose a tax upon interstate business, though it may tax

the local business of a corporation engaged in interstate commerce.

In *Postal Telegraph Co. vs. Adams,* 155 U. S. 688, at page 695, 15 S. Ct. 268, 39 L. Ed. 311 at 315, the Court pointed out that property of a foreign corporation engaged in interstate commerce could be taxed in the state where located, but that duties laid on the subjects of interstate commerce or on the receipts derived therefrom amounted to a regulation of such commerce and therefore was repugnant to the commerce clause of the Constitution.

A tax upon gross receipts of a telegraph company engaged in interstate commerce will be enjoined as to that portion of the receipts derived from interstate commerce. *Ratterman vs. Western Union,* 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229.

In other cases cited in the Ratterman case it is held that a state tax on interstate telegraph messages is not enforceable. To the same effect is the holding in *Western Union Telegraph Co. vs. Seay,* 132 U. S. 472, 10 S. Ct. 161, 33 L. Ed. 409.

It is said in a very recent case in our own Supreme Court, *Transcontinental and Western Air, Inc., vs. Lujan,* 36 N. M. 64, 8 Pac. (2nd) 103, "Interstate commerce is sacred only because of the exclusive power of the Congress to regulate it. Many forms of state taxation are permitted, even though a burden may fall upon those engaged in commerce among the states. 'Even interstate commerce must pay its way'."

Also directly in point with the above is the case of *Matson Navigation Co. v. State Board of Equalization,* 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791, rehearing denied 297 U. S. 728, 56 S. Ct. 666, 80 L. Ed. 1011.

All of these cases are authority for the proposition that a tax on gross receipts of companies engaged in interstate commerce amounts to a tax upon the business itself and therefore constitutes a direct and substantial burden upon

such interstate commerce. But a tax imposed upon net income of a company engaged in interstate business is entirely different, and the imposition of such tax does not contravene the commerce clause of the Constitution.

As was said in *United States Glue Co. vs. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135.

> "A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

In speaking of the tax upon net profits the Court further said:

> "A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

Other cases supporting this view are *Virginia vs. Imperial Coal Sales Co., 293 U. S. 15, 79 L. E. 171, 55 S. Ct. 12. Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054; *Fox Film Corp. vs. Doyal*, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; *Educational Film Corp.*

vs. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400; and *Anglo Chilean Nitrate Sales Corp. v. Alabama,* 288 U. S. 218, 53 S. Ct. 343, 77 L. Ed. 710.

In *Commonwealth of Virginia vs. Imperial Coal Sales Company,* 293 U. S. 15, 55 S. Ct. 12, 79 L. Ed. 171, the court held that interstate commerce is not unconstitutionally burdened by a state's imposition on a domestic corporation, having its principal place of business in the state, whose sole business is that of selling in interstate commerce coal for foreign coal mining companies, collecting the proceeds of sale and paying them, less commissions, to the mining companies of a so-called "capital tax", which is in fact an ad valorem tax on the excess of the corporation's bills and accounts receivable over its bills and accounts payable, and on money on hand and on deposit.

The Court stated:

> "The effect upon interstate commerce as in other instances of non-discriminatory property taxation is at most indirect and incidental."

Congress has the power, under the commerce clause, to regulate commerce with foreign nations and among the several states and with the Indian tribes. This power was surrendered to Congress by the states and therefore no state can enact or enforce any measure, the effect of which is to constitute or impose a direct burden upon interstate commerce.

But this does not mean, as heretofore pointed out, that the state has no power to levy taxes at all affecting interstate commerce. In the case at Bar the tax under consideration is an excise tax, a privilege tax, and is a valid exercise of the state's taxing power. *Postal Telegraph Cable Co. v. Adams,* 71 Miss. 555, 14 So. 36, 42 A.S.R. 476.

To escape the force of this doctrine appellant argues that the tax in question is not in reality upon the privilege of engaging in business, but one upon the sale or transaction

itself. To sustain this argument it cites Sec. 204 of the Act relating to the absorption of the tax. Without conceding the materiality of such argument, we submit that a mere cursory examination of the Act demonstrates the inherent fallacy of such a contention. The title of the act states distinctly and unequivocally that it is levied for the privilege of engaging in business or following a profession. By Section 3 (g), casual or isolated sales and transactions by persons in holding themselves out as engaged in business are exempt. Section 310 requires the payment of a license fee of $1.00 as a prerequisite to engaging in business. (Appendix A). These two sections alone are enough to illustrate that Chapter 7, Special Sessions Laws of 1934, is in reality an excise for the privilege of engaging in business, and not a tax levy upon the sale or transaction. In typical sale or use tax acts casual or isolated sales are not exempt such as in the case at bar, but the tax is actually levied upon the transaction. That a tax similar to the one under consideration is an excise for the privilege of engaging in business, and not a tax upon the sale or transaction, is no longer subject to doubt. See *In Re Messenger's Merchants Lunch Room* (C. C. A. 7), 85 Fed. (2d) 1002.

For the information of the Court we desire to point out in addition to what has already been said, that most of the general rules concerning this matter are fully set forth in 5 R.C.L. pages 784 to 801, and in notes in 6 L.R.A. 579; 11 L.R.A. 246-179; 12 L.R.A. 624; 29 Law Ed. 158; 9 L.R.A. 366; 6 Law Ed. 23-678; 32 Law Ed. 229; 37 Law Ed. 217; 38 Law Ed. 1041; 39 Law Ed. 311-538.

C.

APPELLANTS' CASES DISTINGUISHED

Appellant relies chiefly upon *Indiana Farmers' Guide Publishing Company vs. Prairie Farmers Publishing Company*, 293 U. S. 268, 55 Sup. Ct. Rep. 182; 79 L. Ed. 356; *Fishers Blend Station, Inc. vs. Tax Commission of the State of Washington*, 297 U. S. 650, 56 Sup. Ct. Rep. 608, 80 L. Ed. 956; *International Textbook Company vs. Pigg*, 217

U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678; *Post Printing and Publishing Company vs. Brewster,* 246 Fed. 321; *State vs. Salt Lake Tribune Publishing Company,* 68 Utah 187, 249 P. 474, 48 A.L.R. 553; *Little vs. Smith,* 124 Kans. 237, 257 P. 959, 57 A.L.R. 100.

As was said by the Supreme Court of New Mexico, (R. 10-19) in the opinion rendered in this case, a careful analysis of these cases in the light of what is said in the *Blumenstock* case, supra, and in *Paul vs. Virginia*, supra, fails to persuade us that the advertising contracts themselves although made between citizens of different states are transactions in interstate commerce.

Our Supreme Court, (R. 10-19) also pointed out, that the *Blumenstock* case had not been decided when the opinion in the *Brewster* case, supra, was written.

However, the *Blumenstock* case was decided several years before the *Salt Lake Tribune* case and the *Little vs. Smith* case, supra, but in neither of these cases was the *Blumenstock* case mentioned and in neither case did the court have the benefit of the *Blumenstock* opinion when they indicated that the advertising contracts were to be deemed as transactions in interstate commerce.

In *Indiana Farmers' Guide Publishing Company vs. Prairie Farmers Publishing Company,* 293 U. S. 268, 55 Sup. Ct. Rep. 182, 79 L. Ed. 356, we find another case to collect treble damages under the Sherman Anti-Trust Act. The plaintiff in that case was the publisher of the Indiana Farmers' Guide at Huntington, Indiana, which had a circulation of one hundred sixty thousand, of which over two-thirds were in Indiana and approximately fifty thousand in other states. The defendants were publishers of newspapers which were general and not vocational in character.

However, the names of the papers were calculated to develop a circulation among farmers in the six mid-western states where published. The larger part of the circulation of each newspaper was in the state where published. Most of the advertisers in the papers were located in states other

than the state of publication and about ninety per cent of the advertising came from points outside of the State of Indiana.

It was claimed that there was a combination in restraint of trade by virtue of an arrangement through the mid-west unit whose officers and agents were representatives of the other defendants. By virtue of this arrangement a combination rate of advertising in all seven of the papers was much less than the total of separate charges for the same advertisement in any six.

In the opinion the court cited and discussed the *Blumenstock* case and distinguished it upon the ground that the subject-matter dealt with in the *Blumenstock* case was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. The court then said:

> "The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between the states of electrotypes sent respectively to petitioners and respondents by their customers to be used in setting of advertisements and the transportation of substantial quantities of the papers in interstate commerce advertising at compensatory rates for an essential element. The opinion in Blumenstock Brothers Advertising Agency vs. Curtis Publishing Company (citation) assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce.

In the case now before this court the subject-matter with which we are dealing is the validity of the act imposing a tax measured by receipts arising from contracts by citizens of other states with plaintiff, appellant here, for the

insertion of advertisements in their magazine which is published in the State of New Mexico.

The mere fact that the magazine itself has an interstate circulation does not thereby give an interstate character to the contracts themselves. The same situation prevails in the Blumenstock case.

Fisher's Blend Station, Incorporated vs. Tax Commission of the State of Washington, 297 U. S. 650, 56 Sup. Ct. Rep. 608, 80 L. Ed 956.

In that case, a Statute of the State of Washington levied a state occupation tax measured by gross receipts from radio broadcasting stations, within the State, and the Radio Station filed suit to enjoin collection of the tax, maintaining that same was enfringement upon the Commerce Clause of the Federal Constitution.

The Court discused the technique of broadcasting and the transmission of intelligence by means of sound waves, through the air and held that it constituted interstate commerce, and the Court further held that as the income of the Radio Company was derived from interstate commerce, the tax measured by its gross income was of a type, which was unconstitutional as being a burden upon interstate commerce.

In the case at Bar, we are not dealing with any imposition of tax upon receipts derived from interstate commerce or any instrumentality thereof.

In the *Fisher's Blend Case,* supra, the taxpayer, for a consideration, transmitted information from its stations in Washington to others who listened in through receiving sets in other states. The very essence of the radio business is direct transmission of intelligence in interstate commerce through the air. As stated by this court in the *Fisher's Blend Case,* it is a transaction similar in nature to the sending of messages across state lines by telephone or telegraph. A radio broadcast is, therefore, essentially an interstate transaction from its inception as it is impossible to confine

its scope within state lines. See *KVL v. Tax Commission*, 12 F. Supp. 497.

In the case at bar the situation is not parallel. Virtually the only element giving any interstate color to the transaction is the distribution of the newspaper or magazine across state lines. The tax under consideration is not one which is directed at the interstate distribution or circulation of periodicals. To the contrary, it is merely a privilege tax measured by the gross amount received in the conduct of a given business. The taxable revenue is derived from the proceeds of advertising contracts which in no way involve direct and uncontrolled dissemination of information in interstate commerce as in the case of radio broadcasts and telephone and telegraph service. Here the essential element bargained for is the furnishing of advertising space in periodicals for a given consideration. Every radio broadcast always and inescapably involves interstate communication, while on the other hand interstate circulation of a newspaper is merely one of the many incidents of its publication. It may or may not have interstate circulation, and the particular advertisement may be inserted with no other purpose than to attract local customers. A newspaper or magazine is not an instrumentality primarily designed for direct dissemination, communication or exchange of information in interstate commerce as are the radio, telephone and telegraph.

In the *Fisher's Blend Case*, the broadcast of the program or advertisement was of itself interstate commerce and could be nothing else. In the case at bar interstate character depends upon interstate circulation of which the advertisement is but an incident. The *Fisher's Blend Case* exemplifies interstate communication of intelligence as giving interstate color to the transaction involved. Here interstate transportation of the periodicals is the only element which may conceivably afford characterization as interstate commerce, with interstate communication of intelligence as a mere incident and not controlling.

The weakness of appellant's analogy is apparent when

we consider the practical effect of the doctrine announced in the *Fisher's Blend case* if applicable to the case at bar. If that doctrine is applicable and is carried to its logical conclusion, not only is foreign advertising exempt, but likewise local advertising. It would fall within the same strictures announced therein, as it involves the same interstate transportation and communication as foreign advertising. This would be so even though a grocer in Santa Fe or Albuquerque, New Mexico, advertised a special one-day sale of staples with no idea at all of attracting customers outside the city. In final analysis, it would mean that the income of newspapers or magazines with interstate circulation, however small, would be exempt, notwithstanding they are not subject to rigid Federal surveillance and license as is the radio. It would mean that one of the most profitable industries in this state would entirely escape sharing its just share of the tax burden. We submit that this court undoubtedly meant to confine the doctrine announced in the *Fisher's Blend* case to radio, telephone, telegraph, or other like instrumentalities which are primarily designed for direct communication of intelligence and information in interstate commerce.

In the case of *International Textbook Company vs. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, there was a continuous movement of textbooks, apparatus, letters of instruction, and the like, and these entered into the very essence of the contract. The movement itself was in constant execution and fulfillment of the contract and did not constitute merely a preliminary step incident to preparing one of the parties for performance as in the case at Bar.

As shown in the Court's opinion in this case, it is argued by counsel for appellant that even if such a contract as the one at hand in the instant case and the one in the Blumenstock case are not deemed as interstate transactions, nevertheless the interstate movement of advertising cuts, mats and copy contemplated by the contracts with advertisers causes such contracts and the performance thereof to constitute transactions in interstate commerce within the doc-

trine of the Pigg case, but as shown in the above discussion of the Pigg case, such premise cannot be correct. No more than could a contract between two residents of the State of New Mexico for the construction of a building in New Mexico constitute a transaction in interstate commerce merely by reason of the fact that the contract conceivably might call for materials and supplies the purchase of which and the delivery of same might involve a movement in interstate commerce.

To repeat our former statement contained in our summary, the revenues derived from these contracts may be taxed by the state and this would be true even though such contracts were deemed to be instrumentalities of interstate commerce inasmuch as the imposition of this tax does not impose a direct or substantial burden upon interstate commerce and it does not unduly interfere with it, but such taxation would only incidentally and remotely affect such interstate commerce.

CONCLUSION

We submit that in view of all the foregoing, that this case falls within the principle enunciated in *Hump Hairpin Manufacturing Co. vs. Emerson,* 258 U. S. 290, 42 S. Ct. 305, 66 L. Ed. 622, and in closing we quote from the opinion therein, page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C 617), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so re-

peatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Comm. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; United States Exp. Co. v. Minnesota, 223 U. S. 335, 343, 56 L. ed. 459, 464, 32 Sup. Ct. Rep. 211; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, 34 Sup. Ct. Rep. 15; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58; United States Glue Co. v. Oak Creek, 247 U. S. 321, 326, 327, 62 L. ed. 1135, 1140, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect, it."

WHEREFORE, appellee submits that there is no error shown in the record and that the judgment and decision of the Supreme Court of the State of New Mexico reversing the decision of the lower court in overruling the demurrer of defendants, appellees here, and with directions to sustain the demurrer should be affirmed.

Respectfully submitted,

FRANK H. PATTON,
Attorney General of the State of N. M.
Attorney for Appellee.

APPENDIX A.

Chapter 7, Special Session Laws of 1934 of New Mexico.

An Act To Provide For the Raising of Revenue for Emergency School Purposes by Imposing an Excise Tax Upon The Engaging Or Continuing In Business, Professions, Trades and Callings For Profit In This State; Providing For The Levy, Assessment, And Collection of Said Tax; Providing For the Distribution of the Taxes so Collected And Making An Appropriation Of The Same; Making Appropriations For The Administration of This Act, And For Refunds of Taxes Unlawfully Collected; Providing Penalties For The Violation of the Provisions of This Act; Repealing Chapter 72, and 115 of the New Mexico Session Laws of 1933, and Declaring an Emergency.

S. B. No. 15; Approved April 25, 1934.

Be It Enacted by the Legislature of the State of New Mexico:

* * * * * * * * * * * * *

"Sec. 3. When used in this act: * * * * *

(g) The term 'engaging' as used in this Act with reference to engaging or continuing in a business or a profession shall also include the exercise of corporate or franchise power, *but the term 'engaging' shall not be construed in this Act to include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business.*" (emphasis ours).

Sec. 201. There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: * * *

I. At an amount equal to two per cent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space);

* * * * * * * * * * * * *

Sec. 202. None of the taxes levied by this Act shall be construed to apply to transaction in interstate or foreign commerce, or commerce with the Indian tribes, which, under the constitution of the United States, the State of New Mexico is prohibited from taxing; nor shall such taxes apply to sales made to the Government of the United States or any of its departments or agencies, nor to sales to the State of New Mexico or any of its departments or agencies; nor to any business or transactions exempted from taxation under the constitution of the United States or the constitution of the State of New Mexico; provided that if the Congress of the United States shall hereafter permit the taxation of transactions in interstate commerce, the taxes levied by this act shall apply to such transactions to the extent permitted by any act of Congress.

Sec. 206. If any person engaged in any business subject to tax under this Act shall ship or transport his products, or any part thereof, out of the state without making sale of such products, or shall ship his products outside of the state in an unfinished condition, the value of the products or articles in the condition or form in which they existed when transported out of the state and before they enter interstate commerce, shall be the basis for the assessment of the tax on such business, and the Tax Commission shall prescribe equitable and uniform rules for ascertaining such value.

Sec. 301. After thirty days from the effective date of this act no person shall engage or continue in any business within this state, subject to taxation under this act, unless he shall file with the Tax Commission an application for a

license. Every such application shall be made upon a form prescribed by the Tax Commission, shall set forth the name in which applicant transacts or intends to transact business, the location of his place or places of business, the character of the business to be transacted, and such other information as the Tax Commission may require. The application shall be signed by the owner of the business, if a natural person, and in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application. Such application shall be accompanied by a license fee of $1.00 for each place of business of the applicant, in charge of the owner, any agent or employee, excluding telephone toll and pay station.

APPENDIX B.

Chapter 9, Session Laws of 1935 of New Mexico.

An Act Creating a Bureau of Revenue, Defining Its Powers and Duties, Providing For a Commissioner of Revenue, Agents, Auditors and Employees; Transferring to Said Bureau the Power and Duty to Administer the Laws With Respect to Automobiles and the Licensing Thereof; the Collection, Disposition and Refunding of Taxes Upon Gasoline and Other Motor Vehicle Fuels; the Taxation of Incomes; the Collection of the School Emergency Tax of 1934; the Collection of Licenses and Taxes on Retail Dealers in Merchandise; and the Collection of Taxes on Alcoholic Liquors; and Other Duties; Transferring to Said Bureau Unexpended Balances and Percentages of Collections Authorized to be Expended for the Enforcement of All the Foregoing Laws, and For a Transfer of Furniture, Equipment and Supplies Used in the Enforcement Thereof; Provided For the Payment of Salaries and Expenses of the Commissioner of Revenue, His Agents, Auditors and Other Employees, and for the Maintenance and Operation of His Department; Locating the Office of Said Bureau and Requiring the Commissioner of Revenue to Give Bond.

Senate Bill No. 5; Approved February 5, 1935.

Be It Enacted By the Legislature of the State of New Mexico:

Section 1. There is hereby established a Bureau of Revenue. The said bureau shall be vested and charged with the following powers and duties, which powers and duties are hereby transferred to it from the commissions, departments and offices now exercising the same as hereinafter set out, to-wit: the powers and duties now conferred and imposed upon the State Comptroller with respect to automobiles and motor vehicles and the licensing thereof; the powers and duties now conferred and imposed upon the State Comptroller with respect to the collection, disposition

and refunding of taxes upon gasoline and other motor fuels; the powers and duties now conferred and imposed upon the State Tax Commission and the State Treasurer by Chapter 85 of the Laws of 1933 as amended by Chapter 29 of the Laws of 1934, Special Session, with respect to the taxation of incomes; the powers and duties now conferred and imposed upon the State Tax Commission by the Emergency School Tax Act of 1934, being Chapter 7 of the Laws of 1934, Special Session; the powers and duties now conferred and imposed upon the State Comptroller by Chapter 73 of the Laws of 1933, and Chapter 33 of the Laws of 1934, Special Session, relating to License and Occupation Taxes on retail dealers in merchandise; the powers and duties now conferred and imposed upon the State Treasurer by Chap. 30 of the Laws of 1934, Special Session, with respect to the levy and collection of taxes on alcoholic liquors; the powers and duties imposed on said Bureau of Revenue shall include the enforcement of all laws relating to the foregoing subjects now existing or hereafter enacted.

APPENDIX C.

Article I, Section 8; United States Constitution.

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * * * * * *

SUPREME COURT OF THE UNITED STATES.

No. 322.—October Term, 1937.

Western Live Stock, a Partnership Composed of Frazier Biggs and D. F. Biggs, Appellants,
vs.
Bureau of Revenue and John A. Bingaman, Commissioner of Revenue.

Appeal from the Supreme Court of the State of New Mexico.

[February 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Section 201, c. 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses.[1] Subdivision I imposes a tax of 2% of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce.

Appellants brought the present suit in the state district court to recover the tax, which they had paid under protest, as exacted in violation of the commerce clause of the Federal Constitution. The trial court overruled a demurrer to the complaint and gave judgment for appellants, which the Supreme Court reversed. 41 N. M. 141. Appellants refusing to plead further, the district court gave judgment for the appellees, which the Supreme

[1] "Sec. 201. There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

. . . . . .

"I—At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: . . . publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) . . ."

Court affirmed. — N. M. —. The case comes here on appeal from the second judgment under § 237 of the Judicial Code.

Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some of which are obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states.

Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495; cf. *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *Engel* v. *O'Malley*, 219 U. S. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. *Williams* v. *Fears*, 179 U. S. 270; *Ware & Leland* v. *Mobile County, supra; Browning v. Waycross*, 233 U. S. 16; *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500, 510; *Utah Power & Light Co.* v. *Pfost*, 286

U. S. 165. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. We lay to one side the fact that appellants do not allege specifically that the contract stipulates that the advertisements shall be sent to subscribers out of the state, or is so framed that the compensation would not be earned if subscribers outside the state should cancel their subscriptions. We assume the point in appellants' favor and address ourselves to their argument that the present tax infringes the commerce clause because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine.

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way", *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. 252, 259; *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, 24; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 696; *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 225, 227, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171; *Western Union Tel. Co.* v. *Missouri ex rel. Gottlieb*, 190 U. S. 412; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. Net earnings from interstate commerce are subject to income

tax, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; cf. *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission,* 266 U. S. 271.

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & S. S.S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. & S. A. R. Co.* v. *Texas, supra; Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298) or added to (*Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U. S. 650) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. *See Philadelphia & S. S.S. Co.* v. *Pennsylvania, supra,* 346; *State Freight Tax,* 15 Wall. 232, 280; Bradley, J., dissenting in *Maine* v. *Grand Trunk Railway Co.,* 142 U. S. 217, 235; cf. *Pullman's Palace Car Co.* v. *Pennsylvania, supra,* 26. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin* v. *Seelig,* 294 U. S. 511, 523.

It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *State Freight Tax, supra,* or upon the freight earned by its carriage. *Fargo* v. *Michigan, supra; Philadelphia & S. S.S. Co.* v. *Pennsylvania, supra,* restricting the effect of *State Tax on Railway Gross Receipts,* 15 Wall. 284, with which compare Miller, J., dissenting in that case at p. 297. Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wis-*

consin & M. R. Co. v. *Powers,* 191 U. S. 379; *Maine* v. *Grand Trunk Railway, supra; Cudahy Packing Co.* v. *Minnesota, supra; United States Express Co.* v. *Minnesota,* 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. *Fargo* v. *Michigan, supra; Galveston, H. & S. A. R. Co.* v. *Texas, supra; Meyer* v. *Wells, Fargo & Co., supra,* with which compare *Wisconsin & M. R. Co.* v. *Powers, supra.* Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine* v. *Grand Trunk Railway, supra; Ficklen* v. *Shelby County Taxing District, supra; American Manufacturing Company* v. *St. Louis,* 250 U. S. 459, or as a method of arriving at the fair measure of a tax substituted for local property taxes, *Cudahy Packing Co.* v. *Minnesota, supra; United States Express Company* v. *Minnesota, supra;* cf. *Postal Telegraph Cable Co.* v. *Adams, supra;* see *McHenry* v. *Alford,* 168 U. S. 651, 670-671, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; cf. *Henderson Bridge Co* v. *Kentucky,* 166 U. S. 150, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. *Fargo* v. *Michigan, supra.* In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted.

In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co.* v. *St. Louis,*

supra, 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen* v. *Shelby County Taxing District*, *supra*, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co.* v. *St. Louis*, *supra*, would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. *Puget Sound Stevedoring Co.* v. *Tax Comm'n*, 302 U. S. —, —. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co.* v. *Pfost*, *supra*; *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, or by its value. *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. Unlike the measure of the tax sustained in *American Manufacturing Co.* v. *St. Louis*, *supra*, it does not embrace the purchase price (here the magazine subscription price) of the articles shipped in interstate commerce. So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. Experience has taught that the op-

posing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought. See *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 227. Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commeree in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. See *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 225.

Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co.* v. *Pfost, supra; Federal Compress & Warehouse Co.* v. *McLean, supra; Chassaniol* v. *Greenwood,* 291 U. S. 584, and that the value of the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellants' circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business.

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are be-

yond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent.

In this and other ways the case differs from *Fisher's Blend Station, Inc.* v. *State Tax Comm'n, supra,* on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. *Station WBT, Inc.* v. *Poulnot,* 46 F. (2d) 671.[2] In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co.* v. *Pennsylvania, supra.* In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. Cf. *American Manufacturing Co.* v. *St. Louis, supra.* In none of these respects is the present tax objectionable.

Affirmed.

Mr. Justice McReynolds and Mr. Justice Butler are of opinion that the judgment should be reversed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[2] Great Britain levies an annual license tax on radio receiving apparatus. See Wireless Telegraphy Act of 1904, c. 24, 4 Edw. 7, as explained by c. 67, 15 & 16 Geo. 5, and implemented by regulation printed in Great Britain, Post Office Guide, July, 1936.